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NO. 86-1120

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UBALDO DIBENEDETTO

V.

COMMONWEALTH OF MASSACHUSETTS--
UNIVERSITY OF MASSACHUSETTS, BOSTON
AND
JAMES RYAN

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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QUESTION PRESENTED

1. When, in an action under the Age Discrimination In Employment Act, 29 U.S.C. §§621-634, a state court has shielded a proven discriminatory employer from liability in a unique precedent in direct conflict with every Federal authority (including the cases under the corollary Title VII of the Civil Rights Act of 1964), is this avoidance of established policy too dangerous to let stand?[1]

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[1] "...[T]he caption of the case in this Court contains the names of all parties." Rule 21.1(b).

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Petitioner, Ubaldo DiBenedetto, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, originally entered on September 8, 1986, on which a petition for rehearing was then denied on October 3, 1986.

OPINION BELOW

The opinion of the Massachusetts Supreme Judicial Court is reported at Mass. ____ ,____ N.E. (1986), and is set out in full in the Appendix hereto, pages 37-55 , infra.[2]

JURISDICTION

The Massachusetts Supreme Judicial Court denied petitioner's timely-filed petition for rehearing on October 3, 1986, after its original judgment and opinion were entered on September 8, 1986, so this petition is timely filed, in accordance with the provisions of Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1257, as petitioner claims that the judgment and opinion of the highest court of the Commonwealth of Massachusetts deprives him of his rights

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[2]The Appendix will hereinafter be cited as "App. ____."

nd privileges under the Age Discrimina-
ion In Employment Act, 29 U.S.C. §621
t seq.

STATUTES AND REGULATIONS

The relevant parts of the Age Discrimina-
ion In Employment Act, 29 U.S.C. §§623(a),
30(b), and 631(a), and one applicable
EOC Guideline, 29 CFR, §1604.11(c), are
et out verbatim in the Appendix hereto
ages 56 , infra.

STATEMENT OF THE CASE

This is a state court action under the
ge Discrimination In Employment Act, 29
.S.C. §621 et seq. (hereinafter usually
eferred to as the "ADEA"). The issue
tarkly presented arises from the plain-
iff's claim that judgment was mandated
y Federal law against both the defendant
tate, qua state university, and the
efendant department head, Ryan, its
upervisory agent, when the jury made a
pecific finding (based on compelling

direct evidence and correct jury instructions) that the defendant department head had discriminated against the plaintiff because of age, and that it was in direct conflict with every Federal authority and a denial of plaintiff's statutory rights when the trial court refused to enter that judgment, which refusal was then affirmed by the Massachusetts Supreme Judicial Court.[3] The plaintiff contends, in essence, that the writ should issue because the Supreme Judicial Court's unprecedented refusal to hold the defendants liable constructs a shield for discriminatory employers under the ADEA and Title VII of the Civil Rights Act of 1964, its corollary predecessor, thereby endangering the

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[3]There are no distracting subsidiary questions lurking in this "clean" record. It was stipulated that the plaintiff complied with all the prerequsites for an ADEA action; he proved a prima facie case; there are no evidentiary questions or state procedural problems; there are no damages issues; and the jury instructions correctly set out the controlling Federal law.

nforcement of the important federal olicy against discrimination in employ- ent. There is no argument that this ederal question was duly raised at every elevant stage of the proceedings, as will e specified further herein.

The plaintiff was an internationally espected scholar of Spanish literature and n experienced teacher. He was the chairman f the department of languages and a rofessor of Spanish and Italian at a oston area college which closed in 1975. n 1977, when the plaintiff was finishing p a teaching and research fellowship at oston College, he telephoned the defendant, yan, the long-time Chairman of the small panish Department at the University of assachusetts at Boston (hereinafter, UMB), nd asked him if there were any teaching ositions available. Ryan told him he was too old." He was then 48. The plaintiff eported that discriminatory comment to

the Dean. In 1978, while teaching temporarily in the UMB Italian Department, the plaintiff went to see Ryan with a senior member of the Italian faculty, who recommended him highly to Ryan as someone who would be valuable to the Spanish Department, but Ryan stated in no uncertain terms that no possibility existed that the plaintiff would be hired. About that time, two positions became available in the UMB Spanish Department, and the plaintiff called Ryan to inquire about them. Alerted to Ryan's predisposition, the plaintiff taped that telephone call without telling Ryan he was doing so.[4] That tape was

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[4]Although the plaintiff was not aware at the time that this was a violation of a Massachusetts statute, the defendant Ryan counterclaimed under it for an invasion of privacy, and at trial the plaintiff admitted his liability thereunder. In answer to an advisory special question, the jury suggested that Ryan recover $1,000, but the trial judge ordered judgment for Ryan in the amount of $2,000. That counterclaim judgment was not appealed. Interest mounts. The price of dispositive evidence, compelling to the jury, but, ironically, unavailing, so far, with judges.

played for the jury, and they heard Ryan tell the plaintiff several times that "the department" needed "younger people."[5] The plaintiff made no formal application for either of those positions, which were offered to "younger people", both in their thirties, selected out of 38 candidates. One of those people testified to a conversation he had with Ryan after he was hired, about the plaintiff's prospects for employment with the Spanish Department. Ryan told him "the department was looking for younger people."

Another opening, the one here in issue, became available for the academic year 1979-1980, and although the Dean had authorized a senior position, the department itself determined to hire a junior

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[5]This dramatic piece of evidence is but one of the important facts not mentioned in the Massachusetts Supreme Judicial Court opinion. Its "summariz[ation] of the facts" (App. 38) is a bland filtrate of the compelling direct proof of the defendants' discrimination.

entry-level member of the department. In early 1979, that position was advertised, and again the plaintiff called Ryan to ask if he could be considered for it. Again, unbeknownst to Ryan, the plaintiff taped that phone conversation, and it was played to the jury. It's repetitive theme was that "the department" was or "we" were "still" looking for "younger people." The plaintiff's cry: "I'm only 50 years old." (At trial Ryan admitted that by this recurring "code phrase", "younger people", he meant "a person probably less than forty.") The conversation ended with Ryan allowing the plaintiff to send in his up-dated curriculum vitae.

The plaintiff was one of the six finalists interviewed by the department Personnel Committee--four faculty members, plus Ryan, who as Chairman of the department was an ex officio non-voting member of the Committee. Four of the six finalists

were "less than forty." Ryan participated in the interviews of the six finalists. The plaintiff told the committee that he would be happy to accept a junior, entry-level salary, his experience and seniority notwithstanding. At the final selection meeting of the Committee, with Ryan in attendance, three of the candidates, including the plaintiff, were eliminated immediately, with no discussion of their qualifications; it was only until the field was narrowed to the three finalists, all "less than forty", that any qualifications were discussed. The Committee's selection of a "younger person" was such a fore-drawn conclusion that the Chairman of the Committee, a senior member of the depart-ment, testified that at that final selection meeting it had been "useless" even to object or speak on the plaintiff's behalf. The Committee voted to recommend that an offer be extended to a 33 year old candidate. It

was then part of Ryan's duties as Chairman of the department to pass his recommendation, concurring with the Committee, along to the Dean, from whom the offer of employment was officially extended.[6] There was, therefore, compelling undisputed evidence that Ryan, a supervisory agent of the university, deeply involved in the hiring decision, discriminated against the plaintiff because of age, and that his discrimination was a determining factor in the decision not to hire the plaintiff. The plaintiff even moved for a directed verdict which was denied.

The trial judge decided that he would send the case to the jury on special interrogatories; 1st, did the Commonwealth "fail

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[6]The defendants made a pro forma effort at trial to defend on the basis that the plaintiff did not have the linguistic qualifications required, but that was not an issue on appeal and is not here. The amount of plaintiff's salary loss was stipulated, the total amount of damages to await a post-verdict hearing before the judge, as is provided by the ADEA.

or refuse to hire the plaintiff because of his age"; 2d, did Ryan "discriminate because of age"; and, 3d, did the Commonwealth "fail or refuse to hire...because of...Ryan's discrimination." The plaintiff objected to the wording of the questions, and, most particularly, that the third question be asked at all, maintaining that under the controlling Federal case law (which the trial judge was intending to follow in his instructions) the necessary "causation" finding would be included in the first two

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questions: that neither could be answered "Yes" unless any "discrimination because of age" was "a determining factor" in the decision not to hire the plaintiff. (This is explicated further in the Reasons For The Allowance Of The Writ, infra, 14-36). The judge did correctly instruct the jury on the first two questions in accordance with the established Federal law, but insisted that the third question be asked. As to that third question, he only told the jury in two sentences that nothing further need be said. The jury answered "Yes" to question two, that Ryan did discriminate because of age, but "No" to the first and third, regarding the Commonwealth's refusal to hire. After briefing and argument, the trial judge entered judgment for both defendants, interpreting the jury's answer to the third question as a failure of proof of "causation." Unavailing was the plaintiff's

citation of the body of Federal case law that the answer to the second question alone mandated judgment against both defendants, because the jury had been instructed that they could not find that the supervisory agent, Ryan, "discriminated because of age", as they did, unless they also found that his discrimination was "a determining factor"--that that was all the "causation" plaintiff need prove, and the answer to the confusing third question must be ignored. The plaintiff moved for a rehearing and to alter or amend the judgment or for a new trial (proffering more Federal law and alternative approaches to try and have the trial court understand that judgment for the plaintiff was mandated), but that motion was denied and an appeal duly taken to the Supreme Judicial Court of the Commonwealth of Massachusetts.[7]

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[7]The Supreme Judicial Court transferred the case from the intermediate Appeals Court, where in the ordinary course it would have been determined, and took this first ADEA case appealed in Massachusetts on direct review.

The governing Federal law was detailed to the Supreme Judicial Court, but on September 8, 1986, the judgment for the defendants was affirmed. As is now explained further (under Reasons For The Allowance Of The Writ), the Supreme Judicial Court crafted an opinion in direct conflict with the unanimous body of governing Federal law, a unique and dangerous precedent. It refused to hold that the jury's finding that Ryan "discriminated because of age", given their correct instruction relevant thereto, required judgment for the plaintiff--held that some further undefined proof of "causation" or nexus was necessary to make the defendants liable for this supervisory agent's proven illegal discrimination. A timely-filed petition for rehearing (arguing that the court apparently "misapprehended" the clear record and dispositive Federal law) was denied without opinion on October 3, 1986 This petition was then duly filed.

REASONS FOR THE ALLOWANCE OF THE WRIT

The Massachusetts Supreme Judicial Court has here constructed an unprecedented prophylactic for employers to avoid liability for discrimination in employment. After an admittedly correct jury instruction on the elements of proof under the ADEA, and given compelling "smoking gun" direct evidence of discrimination, the jury specifically found that the plaintiff had been "discriminated against...because of his age" and that the "discrimination [was] done in willful violation of the law." The Massachusetts Supreme Judicial Court refused, however, to order judgment against the state university and its supervisory agent, the department head who had discriminated. That holding is in direct conflict with every relevant Federal authority, including decisions of this Court. It could vitiate not just the important Federal policy established by the

ADEA, but also endanger every action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C., §2000(e), et seq. Unless this aberrational precedent is struck down, the heretofore consistent implementation of the Federal policy against discrimination in employment may be thrown into disarray. That very real prospect should warrant the Court's attention. (While incidental to the more fundamental reasons f granting the writ, this state court construc also works a grave injustice to this petitioner, and this is a "good", "clean" record, starkly presenting the legal issue.)

It is universally recognized that the ADEA is, essentially, the same as Title VII- basically adds age discrimination to the discriminatory prohibitions of the latter statute--and that the more numerous interpretations of Title VII serve as ADEA precedents. As this Court reiterated last year, an "interpretation of Title VII of

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the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in haec verba from Title VII.' Lorillard v.Pons,supra, 434 U.S., at 584." Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 117 (1985). That precept was accepted by the state court in this case (App.44). The reverse application is, of course, equally true: ADEA interpretations may serve as Title VII precedents. That presages the broader mischief endemic to this case: the subject ADEA "substantive" "interpretation" may jeopardize subsequent Title VII actions, since the liability for discrimination by a supervisory employee is the same--only the kind of prohibited discrimination is different.

The potential dangers of this unique interpretation of the ADEA (and, by easy extension, Title VII) are not diminished by

the fact that it emanates from a state court. This is the first deviant ADEA opinion from any court; this is the first of the 29 state court ADEA decisions in which a petition for certiorari has ever been sought in the 19 years since its enactment; and the Massachusetts Supreme Judicial Court is a particularly respected state court. This first break from the desirable consistency exhibited by the array of anti-discrimination authority makes it particularly notable. Employers will be quick to use this precedent if it remains viable.

There is a need for this Court to make it plain that evasions of the ADEA or Title VII will not be countenanced, particularly when the evasion constructed here arises, or can be made to arise, in most any employment discrimination actions. The didactic benefits from granting this

petition will be far-ranging.[8] The Court seems sensitive to this need: Johnson v. Mayor and City Council of Baltimore, ___U.S. ___, 105 S.Ct. 2717 (1985), involved, by any measure, an ADEA issue far less substantial than the instant case, but the Court granted certiorari "[b]ecause [the] case present[ed] serious questions about the administration of the ADEA", and noted unanimously that the Court "would be remiss" "to permit nonfederal employers to circumvent" "the mandate of the ADEA." Id., at 2721 and 2722. All employers could circumvent the ADEA and Title VII if the instant precedent is not struck down, and, this being the only ADEA opinion of the Massachusetts Supreme Judicial Court, the opportunity for Massachusetts employers is particularly clear.

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[8] None of the Court's eight ADEA opinions happen to touch upon the issue here presented or any of the subsidiary facets.

Rarely is it possible to present the compelling direct proof of discrimination adduced in this case--tape-recorded admissions by the defendant department head, the university's supervisory agent, etc. The jury had no difficulty[9] specifically finding not only that "the defendant James Ryan discriminate[d] against the plaintiff because of his age", but that such "discrimination [was] done in willful violation of the law."[10] Those two findings

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[9] The jury "took about two minutes" to answer "Yes" to the special interrogatory #2, that the defendant Ryan had "discriminate[d] against the plaintiff because of his age." That was reported to counsel, post-verdict, and made a part of an affidavit in support of a post-judgment motion. That is but one of the important record facts the Supreme Judicial Court chose not to include in its result-oriented opinion.

[10] A special interrogatory regarding "willfullness" is usually presented to juries in ADEA cases when the evidence warrants, of course, because 29 U.S.C. §626(b), provides for, so-called, "liquidated damages" if the age discrimination is "willful"--in effect, a punitive doubling of lost salary damages.

were made in accordance with jury instructions which, it is admitted by all, correctly set out the applicable Federal law in ADEA cases--what the Massachusetts Supreme Judicial Court termed "the judge's unimpeachable instructions" (App. 54).[11] That brings the focus to the nub of this petition: that the court then avoided the required judgment by ignoring those "unimpeachable instructions" and the established Federal law they reflected.

The jury was correctly instructed that in order to find that Ryan, the defendant department head, "descriminat[ed] against the plaintiff because of age" the plaintiff had to prove "that age was a determining factor", that "[b]ut for [the defendant's]

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[11] The Supreme Judicial Court correctly noted (App. 51) that "the [trial] judge delivered a charge to the jury which in large measure tracked the language of Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), a decision construing the ADEA." Loeb has become a leading case, and its criteria of proof are often cited and generally utilized. This Court quoted from the case with approval on another matter last year. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 117 (1985).

motive to discriminate against [the plaintiff] on account of age, he would have been hired...." (App.42). The jury specifically found that this "determining factor" or "but for" standard of causation was met as to the defendant Ryan by answering special interrogatories #2 and #4 "Yes."[12] Since the agent, Ryan, was a named defendant (rather than the employer being the only defendant, as is true in most ADEA or Title VII cases), that necessitated separating the special interrogatory and instruction from those relating to the university. The jury instruction on Ryan's liability was also in

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[12] "2. Did the defendant James Ryan discriminate against the plaintiff because of his age?"

"4. Was any discrimination done in willful violation of the law?"

[13] It was necessary in this case to keep Ryan as a named defendant because the university's insurance definitely covered any liability of Ryan's, but the coverage for any liability of the Commonwealth, qua university, was very much in doubt (contrary to what might be expected), and appropriations for governmental liability judgments are notoriously difficult to secure in the Commonwealth of Massachusetts.

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accordance with established law. In 29 U.S.C. §630(b), Congress included "any agent" within the definition of an "employer" who may be liable for "discrimination because of age", but the courts have, pragmatically, come to narrow "any agent" to "supervisory" or "management" personnel, someone who played an effective role in the employment decision in issue--the janitor, for instance, would not evoke the employer's respondeat superior liability.[14] Sometimes,

---

[14] Case authority abounds for the precept that if an agent like Ryan discriminates, both he and his employer are liable; particularly apposite, as examples: when "the department chairman [like Ryan] had the authority...[to] effectively recommend....had some input in the...decision.... played some role in the...decision", Fisher v. Flynn, 598 F.2d 663, at 665, 666 (1st Cir. 1979); "...a supervisor authorized...to participate in or recommend such actions [hiring or firing]," Miller v. Bank of America, 600 F.2d 211 at 213 (9th Cir. 1979; a university president, because authorized to make recommendations to the Board of Trustees, Goodman v. Board of Trustees of Community College District 524, 498 F.Supp. 1329 (N.D. Ill. 1980); supervisor authorized to recommend, Padway v. Palches, 665 F.2d 965 (9th Cir. 1982); supervisory personnel "whose action or inaction bore on plaintiff's discharge", DeGrace v. Rumsfeld, 614 F.2d 796 at 803 (1st Cir. 1980); "...any party who significantly affects access of any individual to employment opportunities", Spirt v. Teachers Ins. & Annuity Ass'n., 691 F.2d 1054 at 1063 (2d Cir. 1982).

of course, whether the discriminatory actor is that kind of liability-evoking "agent" may be a contested issue of fact, but in this case, given the undisputed evidence of the degree of Ryan's involvement in the decision to hire a "younger person", the trial judge correctly instructed the jury that Ryan was "that kind of agent." After reminding the jury that the "authority to hire" was in the Dean, here, in full is what he charged the jury regarding special interrogatory #2 and Ryan's liability:

> "...You may recall that in this case there was evidence of a committee, a personnel committee, who interviewed who made recommendations. Professor Ryan said it was then his job--he's bound by that--said it was his job either to disagree or to agree. In other words, he gave his opinion concerning the choice that the committee made, and then everything was passed along to the dean, who made the decision with respect to hiring.
>
> "But with respect to Professor Ryan, even though he didn't have authority to hire, he also didn't have the right in that process before the hiring to do anything in the way of discriminating against the plaintiff because of his age, in accordance with the standards

> that I have already given to you [i.e. the "determining factor" or "but for" standards necessary to find a defendant "discriminated because of age"]. It's clear that an agent may not discriminate against an individual seeking employment because of that individual's age--and again, whenever I say "the age," it is of course within that age group of what we are talking about. So I don't think it requires any further explanation as far as Question No. 2 is concerned.
>
> "You have to decide whether Professor Ryan discriminated against the plaintiff in the selection process, all right? because he was involved with that to some degree, even though he couldn't say whether or not the plaintiff was hired. He had a recommendation, and if in exercising that right to make that recommendation he discriminated because of age, that was improper under the law.
>
> "Again, I make no--I give no opinion, that is, as to whether or not there was discrimination by him. That's a question of fact for you to decide.
>
> "Now we go to Question No. 3...."

When the jury then asnwered "Yes", that Ryan <u>had</u> "discriminate[d] against the plaintiff because of his age" judgment was mandated against both him <u>and</u> the university--quite separate from the exacerbating finding in answer to question #4, that his "discrimination [was] done in willful violation of

the law." The Massachusetts Supreme Judicial Court acknowledged that "if Ryan were found to have violated the ADEA, then the Commonwealth would also be held liable on the theory of respondeat superior. See Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979) (company liable under Title VII where employee discharged for failure to acceed to supervisor's sexual advances)." (App. 50, n. 7). The Supreme Judicial Court also recognized that "Ryan is properly considered an 'employer' subject to the proscriptions of the ADEA...." (App. 50).

Then why wasn't judgment ordered for the plaintiff? How could the Supreme Judicial Court have avoided ordering judgment against both Ryan and the university in the face of such clearly established Federal law? It did so by inventing the need for further proof of a causal connection between the established

discrimination of a supervisory agent like Ryan and the university's ultimate decision to hire a "younger person." That construct is in direct contravention of the body of uncontradicted Federal law and can henceforth thwart Federal policy in any discrimination case. The Supreme Judicial Court held (App. 49-52):

> "...Although the jury found in their answer to Question 2 that Ryan harbored a discriminatory motive against the plaintiff, their answer to Question 3[15] indicates that Ryan's discrimination was not a causative factor in the plaintiff's failure to be hired by the Commonwealth.
>
> "...Ryan...is only liable under the terms of the statute if he 'refus[ed] to hire' the plaintiff because of his age. 29 U.S.C. §623(a). A discriminatory motive absent a causative impact on the conditions of employment, is not actionable...'to hold otherwise would mean that non-causal discrimination in a vacuum is a basis for civil liability'."

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[15] "(Only answer this question if you have answered Question 2 [re Ryan's discrimination] "Yes") Did the Commonwealth fail or refuse to hire the plaintiff because of the defendant Ryan's discrimiantion?"

But Ryan, of course, was not a janitor, say, and all the "causative impact" necessary was included in the jury's answer to question 2. It made a total liability case in and of itself. The jury was correctly told that they could not answer "Yes" unless the plaintiff proved "that age was a determining factor", that "but for [Ryan's] motive to discriminate...[the plaintiff] would have been hired."[16] This Court has

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[16] The Supreme Judicial Court's opinion makes it appear (App.51) that the "but for" element of "causation" was explained to the jury as part of the instruction on question 3, the negative answer to which the court makes dispositive, but that is not so. That quotation from the charge is explaining what goes into a finding that either defendant "discriminated because of age." They were, correctly told that they could not answer question 2 "Yes", that Ryan "discriminated because of age", without being persuaded that "but for that discrimination [the plaintiff] would have been hired." The "Yes" to question 2 included all the "causation" necessary.

The Supreme Judicial Court also misrepresents on that page of its opinion the holding of Padway v. Palches, 665 F.2d 965 (9th Cir. 1982). Nowhere does the Ninth Circuit opinion say that liability attaches only if the Board of Trustees "relied on" the discriminatory superintendent of schools recommendation that the plaintiff be discharged. The court said, on page 967, that "[t]he District would be liable, on the theory of respondeat superior, for the actions of [the superintendent], an employee

made it very plain that "...no more [causation] need be shown [by, there, a 'Title VII plaintiff'] than that race was a 'but for' cause." McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 at 282 n. 10 (1976). Quoting the Court's precept, and holding in accord therewith re "the level of causation required", the Third Circuit recently observed: "We find no indication in any decisions of the Supreme Court, or any other court, that signals any deviation from the use of the 'but for' test of causation." Lewis v. University of Pittsburgh, 725 F.2d 910 at 915 (3d Cir. 1983). That is still true, except for, now, the Supreme Judicial Court's instant "deviation."

(Footnote 16 continued)

who is authorized to recommend hiring or firing", who "played a large role in the decision to reassign [the plaintiff]." The case exactly supports the proposition of law which this plaintiff urges be protected and explicated by this Court in granting review in this case.

Only a few months ago the Seventh Circuit reaffirmed the "determinative factor" "but for" standard was all the proof of causation an ADEA plaintiff need meet. McNeil v. Economics Laboratory, Inc., 800 F.2d 111 (7th Cir. 1986). The Supreme Judicial Court refused to follow that law.

All the Federal cases (those cited above are but exemplary) demonstrate that the Supreme Judicial Court was dead wrong to hold that a further causative nexus must be proven between the discrimination of an agent like Ryan and his corporate principal. Boards of directors and university trustees do not record their lawlessness in their minutes. The Eleventh Circuit keenly understood the realities and the debilitating dangers were the Supreme Judicial Court precept to survive:

> "In a typical Title VII case, an employer is held liable for the discriminatory actions of its supervisors which affect the tangible job benefits

of an employee on the basis of race, religion or national origin....The reason for this stern rule is readily apparent: [quoting from Tidwell v. American Oil Co., 332 F.Supp 424 at 436 (Utah, 1971)]

> '...The modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action'."

Henson v. City of Dundee, 682 F.2d 897 at 909 (11th Cir. 1982).[17]

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[17]Note also this statement of the rule on apposite facts (the ultimate hiring authority rested in the defendant State Board, subject to "the [college] council" previously confirming appointments, and "the council" was the discriminating "agent"):

> "...For Title VII purposes, it is not necessary for individuals or the council to have total control or ultimate authority over hiring decisions. If the involvement is sufficient and necessary to the total employment process, the individual is considered an employer...." Rivas v. State Board of Community Colleges, 517 F.Supp. 467 at 470 (Col. 1981).

The EEOC guidelines also make this ineluctably clear:[18]

> "...an employer...is responsible for [the] acts...of its agents and supervisory employees [who discriminate] regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." 29 CFR,§1604.11(c).

All of this law, and more, was detailed to the Massachusetts Supreme Judicial Court, both in plaintiff's brief in chief, and then, after its opinion was handed down, more pointedly in a petition for rehearing. The court's unprecedented holding is not from ignorance, but design. The court's disingenuous answer to plaintiff's argument "that Question 3 is irrelevant as a matter of law" and to be ignored (under the correlative to Fed.R.

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[18] Only last Term, the Court expressly relied upon EEOC guidelines "for guidance" in holding that sexual harassment charges would provide the basis for a Title VII claim. See, Meritor Savings Bank, FSB v. Vinson, ___U.S.___,___, 106 S.Ct. 2399, 2405 (1986).

Civ. P. 49)--plaintiff having importuned the trial judge not to ask Question 3--is simply to mischaracterize the argument: "The plaintiff confuses the definition of employer with the ultimate issue of causation" (App. 50). As demonstrated above, that is not true at all--but an echo of Humpty Dumpty: "When I use a word...it means just what I choose it to mean...."

Basic to the Supreme Judicial Court's evasion of Federal law, and proof of the extent to which the court had to obfuscate in order to construct its "shield of individual employee action" for "employer[s]... to hide behind" (as the Henson court put it), is the total invalidity of the court's making the jury's answer to Question 3 proof "that Ryan's discrimination was not a causative factor." The trial judge gave the jury only four sentences of instructions on Question 3 (and two of those may be disregarded for instant purposes). Here is

all he said:

> "I don't think that question [3] requires any further explanation. I have already told you of the evidence as I reviewed it with respect to Professor Ryan's participation in the hiring process, and you may not agree with my summary of that. Your recollection may be different, and I may have made an error. Always remember that it is your collective recollection that controls any decision of fact in this case.
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> "Now we get to Question No. 4...."[19]

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[19] It is also significant to note that in the succeeding "willfulness" instruction on Question 4, the trial judge concluded: "Now, remember that in answering this question you answer it if you've answered either 1 or 2, so that's in the alternative." If that wasn't an implicit recognition that Question 3 was immaterial for liability to result, it surely (and correctly) told the jury that there could be a "willful violation of the law" (#4) only if they answered 1 (re the Commonwealth) or 2 (re Ryan) "Yes", and if they did, 3 was immaterial.

Granted, it is anomolous that the jury did not answer "Yes" to Question 3, in light of the instruction on Question 2 and their "Yes" thereto, but they reported they were confused by Question 3 and the instruction thereon. The same post-judgment affidavit alluded to in footnote 9, supra, specified the report from the jury "that the jury did not understand what question 3 added; they had thought it was repetitious of question one, and that having answered question one 'no', they had to answer three 'no'"--"how could there be a problem when we found, by our answers to questions 2 and 4, that the defendant Ryan had willfully discriminated...." (The trial judge and everyone in the courtroom had seen most of the jurors joyfully embracing the plaintiff and his wife after their verdict was reported.)

Given that instruction, it is patently impossible, of course, to characterize the jury's answer to Question 3 as demonstrating that Ryan's "willful" discrimination constituted only "non-causal discrimination in a vacuum", as the Supreme Judicial Court held. Whatever that two sentence instruction was, it was not an instruction on "causation."

Necessary to the Supreme Judicial Court's result-oriented holding is the pretence that the trial judge's instructions relative to the key questions, 2 and 3 (set out above) were not given. Those instructions are, of course, the sine qua non to any valid effectuation of the jury's answers to those questions, as a jury is presumed to have followed those instructions. Nowhere in the Supreme Judicial Court opinion are those dispositive portions of the charge alluded to, however. The opinion's extensive "causation" quotations from the charge (App. 42-45) all pertain to the

basic definitions and delineations of the elements of proof given under Question 1 (then adopted by reference in the instruction on Question 2); do not relate at all to Question 3, as the opinion would make it appear. For there to be a veneer of intellectual honesty--to even be able to say that the jury's answer to Question 2 went only to "motive" and its answer to 3 proved the absence of "causation"--the court restricted itself to the words of the questions and answers themselves, and ignored the instructions thereon which, perforce, imbue them with legal significance. The Supreme Judicial Court had to utilize a pretence to work its evasion of the Federal policy against discrimination in employment.

C O N C L U S I O N

For the reasons stated above, there is a compelling need to issue a writ of certiorari to review the judgment and opinion of the Massachusetts Supreme Judicial Court.

Respectfully submitted,

Francis X Nee

Francis X. Nee
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DATED: January 2, 1987

APPENDIX

S-4111 S.J.C.

UBALDO DIBENEDETTO

VS.

COMMONWEALTH & another[1]

Suffolk. May 7, 1986 - September 8, 1986.

Present: Hennessey, C.J., Wilkins, Liacos, Abrams & Lynch, JJ.

Employment, Discrimination. Evidence, Opinion. Practice, Civil, Special Verdict.

Civil action commenced in the Superior Court Department on October 30, 1980.

The case was tried before Chris Byron, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Daniel F. Featherston, Jr. (Mary Elizabeth Beim with him) for the plaintiff.

Lawrence T. Bench for the Commonwealth & another.

HENNESSEY, C.J. The plaintiff appeals from a judgment of the Superior Court dismissing his claims under the Age Discrimination in Employment Act of 1967 (ADEA), 29

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[1]James Ryan.

U.S.C. §621 et seq. (1982 & Supp. II 1984). We transferred the case here on our own motion, and now affirm.

We summarize the facts. Prior to 1974, the plaintiff was chairman of the department of languages, and professor of Spanish and Italian, at Newton College of the Sacred Heart. This college closed in 1975. After completing a research fellowship at Boston College, the plaintiff accepted a position as lecturer in the Italian Department at the University of Massachusetts at Boston (university). In 1979, the plaintiff applied for an advertised tenure track position in the Spanish department at the university. The advertisement stated that the university was seeking an individual with "special training or experience in Applied Linguistics and to serve as Coordinator of first and second year courses in Spanish." Candidates were directed to contact Professor James Ryan,

chairman of the Spanish department.

The plaintiff initiated an application for this position by telephoning Ryan. Unbeknownst to Ryan, the plaintiff tape recorded their telephone conversation.[2] Ryan told the plaintiff that the department was "looking for some younger people." The plaintiff was fifty-one years old at the time of his application. Nonetheless, Ryan requested the plaintiff to forward his curriculum vitae and list of linguistic courses for consideration.

The plaintiff, along with five other final candidates, was interviewed for this position by the Spanish department's personnel committee. Ryan, as chairman of the department, was an ex officio, non-voting member of the committee. The committee ultimately voted to recommend that an offer be extended to another candidate, Professor Esther Torrego, who

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[2]According to the plaintiff, he had been alerted by Ryan's predisposition on the subject of age through prior conversations with the department chairman.

was then thirty-three years old. Members of the committee testified that the ages of the applicants were not considered by the committee in the selection process. Ryan forwarded the committee's recommendation, with his approval, to the dean, who extended the formal offer to Torrego. Ryan informed the plaintiff that he had not been selected for the position.

The plaintiff brought suit against the university and Ryan in 1980, alleging that the defendants had discriminated against him in employment on account of his age, 29 U.S.C. §621 et seq.[3] In their answer, the defendants denied that the refusal or failure to hire the plaintiff was based on his age. The defendant Ryan also

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[3]Section 623(a) of the ADEA provides in relevant part: "It shall be unlawful for an employer--(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age...."

counterclaimed against the plaintiff under G.L. c. 272, §99Q (1984 ed.) which provides a civil remedy for the unauthorized interception of oral or wire communications.

The case was tried before a jury in May, 1984. At the close of trial, the judge delivered a charge to the jury which in large measure tracked the language of Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), a decision construing the ADEA.

Footnote 3 continued

Section 630(b) defines "employer" as follows: "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceeding calendar year . . . . The term also means (1) any agent of such person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State...."

Section 631(a) provides: "The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age."

The parties stipulated at trial that the plaintiff had complied with all statutory prerequisites to the commencement of a civil action under the ADEA. See 29 U.S.C. §626(c).

The parties did not object to these instructions. We quote at length from the judge's charge, as it bears directly on the issues raised by the plaintiff on appeal.

The judge instructed the jury that the plaintiff "must persuade you that age was a determining factor in [his] not being hired. It need not be the sole factor for not obtaining the position sought, but rather, it must be a determining factor....But for his prospective employer's motive to discriminate against him on account of age, would he have been hired for the position for which he had applied?" This "determining factor" standard of causation has been adopted by numerous Federal courts which have interpreted the ADEA. See Equal Employment Opportunity Comm'n v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1170 (10th Cir.), cert. denied, 106 S.Ct. 312 (1985); Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1181 (6th Cir. 1983); Geller v. Markham, 635 F.2d 1027, 1035 (2d Cir. 1980); Loeb v. Textron, Inc., supra at 1019.

The judge further instructed the jury that "[y]ou will be warranted...in finding that the plaintiff was discriminated against because of his age if the plaintiff proves to you--that is, if you are persuaded by the greater weight of the evidence that, first of all, he applied...for a job that the Commonwealth was seeking to fill; second, that he was within the protected age bracket of that statute; that is, that he was between the ages of 40 and 70, and if he was below that it would be of no consequence; third, he must prove to you that he was qualified for the job; fourth, that despite his qualifications he was not hired; fifth, a person with equal or inferior qualifications who was younger or outside the protected age group was hired; and sixth, all of the stated reasons given as to why he was not hired were a pretext or cover-up for not hiring him." This instruction tracks the order and

burden of proof for disparate treatment cases first enunciated by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (Title VII of the Civil Rights Act of 1964), and generally applied in the age discrimination context by the lower Federal courts. See Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193, 1196 (8th Cir. 1982), cert. denied, 460 U.S. 1080 (1983); Sutton v. Atlantic Richfield Co., 646 F.2d 407, 411 (9th Cir. 1981); Loeb v. Textron, Inc., supra at 1016. See also Trans World Airlines, Inc., v. Thurston, 105 S.Ct. 613, 621 (1985) ("interpretation of Title VII...applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in haec verba from Title VII'").

Finally, the judge instructed the jury that both the university and Ryan could be held liable for any causative

discrimination. "Now the word 'employer' under that statute includes a state, such as the Commonwealth of Massachusetts, or any of its agencies. It includes the University of Massachusetts, and any agent. And there is no question, I've already told you that the University of Massachusetts is an agency of the Commonwealth, and the defendant James Ryan is an agent of the Commonwealth of Massachusetts. So both Massachusetts and Dr. Ryan could not, or were not permitted by statute to fail or refuse to hire any individual because of his age." See 29 U.S.C. §630(b).

Based on these instructions, the jury were given a special verdict sheet with five questions.[4] After reporting

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[4]The questions, and the jury's answers thereto, are as follows:

"1. Did the Commonwealth fail or refuse to hire the plaintiff because of his age?" Answer: "No."

"2. Did the defendant James Ryan discriminate against the plaintiff because

their answers, the jury were discharged. Both sides moved for entry of judgment in their favor, and the judge heard argument on these motions. The plaintiff argued that Question 3 was unnecessary to the judgment as a matter of law and should be disregarded, and that judgment should be entered against both defendants based on the jury's answer to Question 2. In the alternative, the plaintiff argued

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Footnote 4 continued

of his age?" Answer: "Yes."

"3. Did the Commonwealth fail or refuse to hire the plaintiff because of the defendant James Ryan's discrimination?" Answer: "No."

"4. Was any discrimination done in willful violation of the law?" Answer: "Yes."

"5. What amount of money should be assessed against the plaintiff to punish him for unlawfully recording the telephone conversation with the defendant James Ryan?" Answer: "$1,000."

that the jury's answers to Questions 2 and 3 were inconsistent, and that a new trial should be ordered. Finally, the plaintiff moved for judgment notwithstanding the verdict.

Based on the jury's answers to the questions, the judge dismissed the plaintiff's claims of age discrimination against both defendnats, and entered judgment for the defendant Ryan in the amount of $2,000 on his counterclaim under G.L. c. 272, §99Q.[5] The plaintiff appealed. The sole question presented on appeal is whether the judge acted properly in dismissing the plaintiff's cliams under the ADEA based on the jury's answers.

We conclude that the judge acted

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[5]The $2,000 figure arrived at by the judge represents $1,000 in liquidated damages imposed by statute, and $1,000 in punitive damages awarded by the jury. See G.L. c. 272, §99Q. At trial, the plaintiff conceded his liability under this statute, and he does not challenge on appeal the entry of judgment on the defendant Ryan's counterclaim.

properly in dismissing the claims against the defendants. In entering judgment based on the jury's answers to the questions, the judge was required to make every effort to harmonize the jury's answers.[6] "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." McCue v. Prudential Ins. Co., 371 Mass. 659, 664 (1976), quoting Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962) (harmonization rule avoids "collision with the Seventh Amendment").

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[6]The judge and the parties refer to the verdict sheet submitted to the jury as "special questions." Although it is not material to our discussion here, it is clear that the jury were asked to render a "special verdict" under Mass.R.Civ.P. 49(a), 365 Mass. 812 (1974), and not answers to special questions coupled with a general verdict under Mass.R.Civ. P. 49(b), 365 Mass. 812 (1974). See Commonwealth v. Licciardi, 387 Mass. 670, 675 (1982).

See Holder v. Gilbane Bldg. Co., 19 Mass. App. Ct. 214, 218 (1985). In this case, we do not perceive any inconsistency between the jury's answers, or between their answers and the judge's instructions. Question 1 is directed at the liability of the university, and the jury specifically found that the Commonweatlh did not refuse to hire the plaintiff on account of his age. Questions 2 and 3 are directed at the liability of Ryan. Although the jury found in their answer to Question 2 that Ryan harbored a discriminatory motive against the plaintiff, their answer to Question 3 indicates that Ryan's discrimination was not a causative factor in the plaintiff's failure to be hired by the Commonwealth.

The plaintiff argues that Question 3 is irrelevant as a matter of law, and that judgment should have been entered against Ryan on the basis of the jury's answer to Question 2. In support of this contention, the plaintiff asserts that an agent

is considered an "employer" under §630(a) of the ADEA, and that an affirmative finding that Ryan "discriminated" against the plaintiff (answer to Question 2) is sufficient to impose liability.[7] The plaintiff confuses the definition of employer with the ultimate issue of causation. Although Ryan is properly considered an "employer" subject to the proscriptions of the ADEA, see Lettich v. Kenway, 590 F.Supp. 1225 (D. Mass. 1984); Seider v. Canada Dry Corp., 17 Empl. Prac. Dec. (CCH) par. 8,369 (S.D. N.Y. 1978), he is only liable under the terms of the statute if he "refuse[d] to hire" the plaintiff because of his age. 29 U.S.C. §623(a). A

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[7]Presumably, if Ryan were found to have violated the ADEA, then the Commonwealth would also be held liable on the theory of respondeat superior. See Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979) (company liable under Title VII where employee discharged for failure to accede to supervisor's sexual advances).

discriminatory motive, absent a causative impact on the conditions of employment, is not actionable. [8] See Kumar v. Board of Trustees, Univ. of Mass., 774 F.2d 1, 20 (1st Cir. 1985) (Campbell, J., concurring), rev'g, 566 F.Supp. 1299 (D. Mass. 1984) (no showing that alleged discrimination by dean corrupted adverse tenure decision of chancellor); Padway v. Palches, 665 F.2d 965, 967 (9th Cir. 1982) (school superintendent liable for sexual discrimination if trustees relied on him in decision to discharge) The judge adequately explained this principle to the jury: "First you've got to decide was there discrimination because of age. That itself isn't enough. You've got to convince yourself that but for that discrimination he would have been hired."

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[8] We are not confronted with a case in which a discriminatory animus (e.g., sexual or racial harassment) so pervades the work environment that it in and of itself affects the "terms, conditions, or privileges" of employment, irrespective of any economic injury. See Meritor Sav. Bank v. Vinson, 54 U.S.L.W. 4703, 4705 (June 17, 1986).

Since the jury specifically found in their answer to Question 3 that the Commonwealth did not "fail or refuse to hire the plaintiff because of the defendant James Ryan's discrimination," the judge appropriately dismissed the plaintiff's claims under the ADEA.[9] As the judge aptly stated in his ruling, "to hold otherwise would mean that non-causal discrimination in a vacuum is a basis for civil liability."

Finally, the plaintiff argues that the judge erred in excluding certain testimony of Alan Francis, a former professor in the Spanish department of the university. Francis testified that Ryan told him that "the department was looking for younger people." The plaintiff's counsel then asked Francis about the degree of deference among department members for Ryan's views as chairman. Upon objection

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[9]Although the judge ordered the dismissal of the plaintiff's complaint, this action had the same practical effect as entry of judgment for the defendants.

by defense counsel, the plaintiff's counsel made an offer of proof that, if allowed, Francis would testify that Ryan was a "very definite force" in the department and not a mere "figurehead." The judge ruled that there was insufficient foundation for this question, and excluded the testimony. There was no error. The plaintiff did not establish that Francis had any personal knowledge which would support an opinion regarding Ryan's influence in the department; Francis was not a member of the personnel committee, and there was no evidence that he had any familiarity with the hiring process or other administrative concerns of the department chairman. On this basis, and assuming that the elicited opinion would be admissible if a proper foundation were laid, the judge acted within his sound discretion in excluding the testimony. See Commonwealth v. Boyd, 367 Mass. 169, 182 (1975).

In sum, based upon the judge's unimpeachable instructions to the jury, the evidence in the case, and the jury's answers to the questions, there was no error in the judge's rulings (1) ordering dismissal of the complaint, and (2) denying the plaintiff's motion for directed verdict, for judgment notwithstanding the verdict, and for a new trial. The evidence warranted conclusions that the ultimate authority to hire rested with the dean, and that the personnel committee did not consider age a factor in making its recommendation. The evidence also warranted a conclusion that the Commonwealth did not fail or refuse to hire the plaintiff because of his age, and the jury found that as a fact in their answer to Question 1. The evidence further warranted a conclusion that the Commonwealth did not fail or refuse to hire the plaintiff because of Ryan's discrimination, and the jury so concluded, as shown

in their answer to Question 3. While it may have been open to the jury to decide that Ryan's discriminatory motive somehow tainted the hiring decision, that clearly was not their conclusion. Accordingly, judgment for both defendants was required.

Judgment affirmed.

STATUTES AND REGULATIONS

29 U.S.C.

Section 623(a) provides (in relevant part) "It shall be unlawful for an employer--(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age...."

Section 630(b) defines "employer" (in relevant part)as follows: "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceeding calendar year....The term also means (1) any agent of such person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State...."

Section 631(a) provides: "The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age."

29 CFR, §1604.11(c) provides (in relevant part) "...an employer...is responsible for [the] acts...of its agents and supervisory employees [who discriminate] regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."